U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

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In re: ANDREW O. EKE

IN RESCISSION PROCEEDINGS UNDER SECTION 246 OF THE IMMIGRATION AND NATIONALITY ACT

CERTIFICATION

ON BEHALF OF RESPONDENT: Richard L. Prinz, Esquire

ON BEHALF OF SERVICE: Merilee Fong
Assistant District Counsel

In a decision dated October 15, 1996, an Immigration Judge issued a decision which rescinded the respondent's status as a lawful permanent resident. The Immigration Judge certified his decision to the Board for review. *See* 8 C.F.R. § 3.1(c) (2000). The decision of the Immigration Judge is affirmed.

I. BACKGROUND

The respondent is a native and citizen of Nigeria who entered the United States as a nonimmigrant visitor on or about August 2, 1984. He married a United States citizen on September 27, 1984. On October 16, 1984, the respondent's spouse filed a visa petition on his behalf before the Immigration and Naturalization Service, and the respondent filed an application for adjustment of status with under section 245 of the Act, 8 U.S.C. § 1255. During the adjudication period, the respondent's spouse withdrew the visa petition. On May 6, 1985, the Service issued a Notice to Show Cause which charged the respondent with deportability under section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as an alien who has remained in the United States longer than permitted.

On August 14, 1985, the respondent's spouse filed another visa petition on his behalf. It was approved on October 29, 1985. In the respondent's subsequent appearance before an Immigration Judge, he conceded deportability and applied for adjustment of status and voluntary departure. In a decision dated March 4, 1986, the Immigration Judge denied both applications in the exercise of discretion. [1] The respondent appealed this decision to this Board. In a decision

[1] The Immigration Judge did not find the respondent truthful and doubted the validity of his marriage.

dated October 29, 1991, we sustained the appeal. We disagreed with the Immigration Judge's decision to deny adjustment of status, and granted the application.[2]

II. THE RESCISSION PROCEEDINGS AND THE DECISION OF THE IMMIGRATION JUDGE

On January 18, 1996, the Service issued the respondent a Notice of Intent to Rescind his adjustment of status. *See* section 246 of the Act, 8 U.S.C. § 1256. It was alleged that on April 23, 1991, the respondent and his United States citizen spouse were divorced, and therefore he was ineligible for adjustment of status at the time of the Board's decision. On March 28, 1996, the Service filed a Superseding Notice of Intent to Rescind based on the same allegation. The respondent requested a rescission proceeding before an Immigration Judge.

The parties appeared before the Immigration Judge on August 13 and October 15, 1996. The respondent asserted that his adjustment of status should relate back to the Immigration Judge's erroneous denial, and that this would remedy his ineligibility for adjustment of status at the time of the Board's decision.[3]

In his final decision, the Immigration Judge found that the date of adjustment was the date of the Board's decision, and at that time, the respondent's visa petition had been automatically revoked. The Service had therefore met its burden of showing that the respondent was not eligible for adjustment of status at the time it was granted. The respondent's lawful permanent resident status was rescinded, and the decision was certified to the Board for its consideration and review.[4]

III. THE PARTIES' ARGUMENTS ON CERTIFICATION

The respondent maintains that his adjustment of status date should be the date of the Immigration Judge's decision. He also points out that neither the Service nor the Board asked him about his marital status before the Board's decision, and that it must be considered that the delay in adjustment was due to the Immigration Judge's error and the length of the appeal period. As an alternative, the

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[2] Specifically, we did not agree with the Immigration Judge's findings regarding credibility and the authenticity of the marriage. We refer the reader to our decision for details of the earlier proceedings.

[3] The respondent also sought to apply for adjustment of status based on an approved visa petition filed pursuant to a June 8, 1991, marriage to a second spouse. *See* Exh. 5-F. The Immigration Judge explained that he did not have jurisdiction over this application in rescission proceedings.

[4] In an accompanying short order, the Immigration Judge refers to an October 29, 1996, order by the Board. He meant 1991.

respondent suggests that the time period for filing the notice of intent to rescind be measured from the Immigration Judge's 1986 decision, and therefore the proceedings be terminated on the basis of untimely notice.

The Service adopts the decision of the Immigration Judge. It stresses that the respondent's adjustment application was only pending before it was granted by the Board, and therefore he needed to maintain section 245 eligibility until this time. On review, we find that the decision of the Immigration Judge should be affirmed.

IV. THE DECISION OF THE BOARD

Section 246(a) of the Act provides that if, at any time within 5 years after the status of a person has been adjusted to that of an alien lawfully admitted for permanent residence, it appears to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment, the Attorney General shall rescind the grant of adjustment. The person is thereupon subject to all the provisions of the Act to the same extent as if the adjustment of status had not been made. In rescission proceedings, the Service has the burden of proving by clear, convincing, and unequivocal evidence that the respondent was not entitled to lawful permanent resident status at the time of his adjustment. *See Matter of Suleiman*, 15 I&N Dec. 784 (BIA 1974) (overruled on other grounds, *Matter of Giannoutsos*, 17 I&N Dec. 172 (BIA 1979)); *Matter of Vilanova-Gonzalez*, 13 I&N Dec. 399 (BIA 1969); *see also Baria v. Reno*, 94 F.3d 1335, 1340 (9th Cir. 1996).

In order to qualify for adjustment of status under section 245 of the Act, an alien must apply for adjustment, establish that he or she is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and show that an immigrant visa is immediately available to him or her at the time the application is filed.

In the current case, it is uncontested that the respondent was divorced from his petitioning spouse on April 23, 1991. At this time, the approved visa petition filed by the spouse was automatically revoked. *See* 8 C.F.R. § 205.1(a)(4) (1991) (redesignated as 8 C.F.R. 204.5(a)(3)(i)(D) (2000)). The respondent lost his eligibility for adjustment of status upon the revocation. *See Id.*; *Matter of Boromand*, 18 I&N Dec. 450, 454 (BIA 1980); *see also Matter of Hernandez-Puente*, 20 I&N Dec. 335, 337 (BIA 1991) (explaining that a nonimmigrant alien is assimilated to the position of an applicant for entry when applying for adjustment, and must maintain visa eligibility at the time the application is acted upon). We accordingly agree with the Immigration Judge's determination that the respondent was not in fact eligible for adjustment when the Board granted the application on October 29, 1991.

The respondent argues that the date of the Board's decision should not be considered the date of the adjustment. He wants eligibility considered at the time of the 1986 Immigration Judge's decision which denied his adjustment application. We find our answer in the regulations, which state that if an application under section 245 of the Act is approved, "the applicant's permanent residence shall be recorded as of the date of the order approving the adjustment of

status." 8 C.F.R. § 245.2(a)(5)(ii) (1991, 2000). This language shows that the date of the Board's decision in this case is the proper adjustment date.[5] We see no authority for considering the application to have been granted to the time it was denied by the Immigration Judge, or to measure eligibility as of the date. *See Matter of Hernandez-Puente, supra*, at 337 (internal cites omitted) ("[a]lthough discretion is given to the Attorney General to admit applicants, he [or she] has no authority to act retroactively on an application").[6]

Similarly, we find no basis for calculating the 5-year period for issuance of a notice of intent to rescind from the date of the Immigration Judge's denial. The proper date is the date of adjustment, which is the Board's October 29, 1991, decision. Therefore, the notice of intent to rescind was issued in a timely manner. *See Matter of Onal*, 18 I&N Dec. 147 (BIA 1981; 1983) *supra*. The respondent also argues that the inequity of his situation should impact the final decision making in this matter. We respond that the result in this case is dictated by the applicable statutes and regulations, and we do not have authority to go outside of these parameters to grant relief where an alien is statutorily ineligible.[7] *Cf. Matter of Hernandez-Puente, supra* (holding that the Board and the Immigration Judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from taking a lawful course of action that it is empowered to pursue by statute and regulation).

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[5] As discussed by the parties, the Board's October 29, 1991, decision entered a further order that the record should be remanded to the Immigration Judge "for action in accordance with the foregoing decision." It is unclear why this order was entered, as our decision granted the respondent adjustment of status which effectively terminated the proceedings. Nonetheless, the additional order does not have any impact on our decision today because it creates no basis for determining that the respondent's adjustment occurred prior to the Board's 1991 decision. There is no indication that further proceedings were in fact conducted by the Immigration Judge.

[6] In *Matter of Hernandez-Puente*, the alien had filed a application for adjustment of status and was told by the Service that it had been granted. However, no grant had been issued, and the respondent lost his eligibility for his visa once he turned 21. The Service subsequently granted the respondent adjustment of status nunc pro tunc, effective to a date when he was still eligible. The Service later issued a notice of intent to rescind which stated that it did not have authority to grant the application nunc pro tunc. The Board agreed with the Service, and rescinded the respondent's status.

[7] We note that if a statutory amendment renders an individual ineligible for adjustment of status prior to a final administrative decision on the previously filed application for relief, the application must be denied. *See Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (internal cites omitted). In the current case, it was the respondent's divorce which rendered him ineligible for adjustment, as opposed to any government action. Insofar as the respondent wants the length of the appeal period considered, we do not find this to be a basis for terminating the rescission proceedings.

V. CONCLUSION

The respondent's lawful permanent resident status has been properly rescinded. The decision of the Immigration Judge is correct and will be affirmed.

ORDER: The decision of the Immigration Judge is affirmed.

FOR THE BOARD